

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

DANIEL M.,

Claimant,

OAH No.: 2010050624

and

EASTERN LOS ANGELES
REGIONAL CENTER,

Service Agency.

DECISION

Jennifer M. Russell, Administrative Law Judge with the Office of Administrative Hearings, heard this matter in Los Angeles, California on July 21, 2011.

Berta M., claimant Daniel M.'s mother, represented claimant.¹ Spanish language interpretation service was provided.

Felipe Hernandez, Chief Consumer Services, represented Eastern Los Angeles Regional Center (ELARC or service agency).

Testimonial and documentary evidence was received, the case argued, and the matter was submitted for decision on July 21, 2010. The Administrative Law Judge makes the following Factual Findings, Legal Conclusions, and Order.

ISSUE

Whether claimant is eligible for supports and services under the Lanterman Developmental Disabilities Services Act (Lanterman Act)² on the basis of "autism."

¹ Initials identify claimant and his representative to preserve claimant's confidentiality.

FACTUAL FINDINGS

1. Claimant is a seven-year-old boy residing with his mother and four siblings within the Los Angeles Unified School District (LAUSD). He is one child in a set of triplets. Claimant has an identical twin that has a diagnosis of Autistic Disorder. Claimant speaks both Spanish and English.

2. By letter dated March 30, 2011, ELARC notified claimant's mother that claimant "has been determined not eligible for Regional Center services, as defined in Welfare and Institution Code and sections 54000 et seq." The service agency stated the following reasons for its determination: "[Claimant] . . . does not qualify for services because he does not have mental retardation or any other developmental disability. Psychological testing indicates that [claimant's] . . . cognitive functioning is within the average range of intellectual functioning. [Claimant] . . . was diagnosed with Pervasive Developmental Disorder NOS (Provisional), Mixed Receptive Expressive Language Disorder, and Phonological Disorder. No medically eligible conditions reported."

3. On April 8, 2011, claimant's mother filed a Fair Hearing Request appealing the service agency's ineligibility determination. Thereafter, these proceedings ensued.

LAUSD Evaluations

4. Claimant enrolled in Head Start in August 2007. His speech was difficult to understand. Consequently, after consultation and evaluation, an individualized education plan (IEP) team placed claimant in Head Start Speech Therapy provided through the Speech Language Improvement Model, which is a group service that meets 60 minutes each week.

5. Claimant continued to receive speech therapy at a frequency of 30 minutes each week after claimant transitioned to the 2009-2010 kindergarten year. Claimant additionally received academic support from a resource specialist teacher in Language Arts for a total of 90 minutes each week.

6. During the first semester of his kindergarten year, claimant was referred for psycho-educational assessment "due to concerns regarding. . . [his] behavior and low academic skills." School psychologist Diana Ginis Socie administered several assessment tools, including the Vineland Adaptive Behavior Scales, Second Edition (Vineland II), the Bracken Basic Concept Scale-Receptive, Third Edition, the Childhood Autism Rating Scale (CARS-2) and the Gilliam Autism Rating Scale-Second Edition (GARS-2). Test results for the Vineland II indicate that claimant's adaptive skills are "well below average when compared to his same age peers."³ Claimant's Bracken scores placed him in the "very

² Welfare and Institutions Code section 4500 et seq. All statutory references are to the Welfare and Institutions Code unless otherwise specified.

delayed” or “delayed” ranges.⁴ Claimant’s total score on the CARS-2 was 35.5, which placed him in the “Mildly-Moderately Autistic” range. His scores on the GARS-2 indicated that the probability of autism was “very likely.”⁵ School psychologist Socie prepared a November 2, 2009 Psychoeducational Assessment Report containing the following summary findings:

[Claimant] . . . exhibits the following autistic-like behaviors: a history of extreme withdrawal, relating to people inappropriately, and continued impairment in social interaction from infancy through early childhood; an obsession to maintain sameness such as resistance to environmental change or change in daily routines; extreme preoccupation with objects and inappropriate use of objects, and self-stimulating, ritualistic behavior which adversely affect his educational performance. These behaviors are not primarily due to environmental, cultural, or economic disadvantage, unfamiliarity with the English language, limited school experience, poor attendance, social maladjustment, mental retardation, visual, hearing, or motor impairment. Based on these results, [claimant] . . . appears to meet eligibility as a student with autism and may be in need of special education services.

7. Thereafter, claimant’s IEP team re-evaluated him and deemed him “eligible for Special Education Services under the handicapping of Autism.” Claimant’s November 13, 2009 IEP indicates the following:

[Claimant] . . . exhibits various behaviors associated with autism and to a marked degree. Some of these behaviors include: smelling or sniffing objects, rocking back and forth while seated, responding inappropriately to simple

³ Claimant’s mother’s rating form on the Vineland generated the following scores: Communication domain-59; Daily living skills domain-73; Socialization domain-70. The teacher’s rating form generated the following scores: Communication domain-56; Daily living skills domain-49; Socialization domain-61.

⁴ Subtest	Standard Score	Range
School Readiness Composite	2	Very Delayed
Direction/Position	6	Delayed
Self-Social Awareness	4	Very Delayed
Texture/material	4	Very Delayed

⁵ Domain	Standard Score(Mother’s rating)	Standard Score (Teacher’s Rating)
Stereotyped Behaviors	7	12
Communication	8	8
Social Interaction	12	13
Autism Index	27	106

commands, withdraws from group situations, cries inappropriately, becomes upset when routines are changed, lines up objects in precise, orderly fashion and becomes upset . . . [when] the order is disturbed, and responds negatively or with temper tantrums when given commands, requests, or directions.

8. Claimant's November 5, 2010 IEP indicates that claimant "has been identified as a student with Autism" and that "it is difficult for him to participate fully in a general education setting." The November 2010 IEP states that claimant "requires a small group environment with a structured instruction program where the information can be provided in small chunks and multiple opportunities be available to re-teach and practice the information presented. He will benefit from modeling, a multi-modal approach to instruction and explicit instruction."

9. Claimant's most recent IEP, which is dated June 21, 2011, echoes his November 2010 IEP. Claimant is enrolled in a special day class and he participates in general instruction during non-core areas.

ELARC's Evaluations

10. On January 20, 2011, ELARC's assessment coordinator conducted an intake interview and prepared a psychosocial assessment report. The assessment coordinator's summary impressions of claimant are as follows:

[Claimant] is fully ambulatory. Fine and gross motor skills appear within normal limits. He speaks English and Spanish and usually mixes both languages. His speech is not readily understandable to those who do not know him well. [Claimant] . . . is reported to be affectionate with his mother. He is reported to get along well with his siblings. According to [claimant's mother, claimant] . . . has a difficult time sharing his belongings and waiting his turn. He does not initiate interactions with his peers, but will interact with them if they initiate. [Claimant] . . . is reported to display temper tantrums approximately three times per week. He is reported to become upset whenever he does not get his way. He is reported to cry, yell, throw toys, and hit others when upset. He does not display any self-injurious behaviors, but did so when he was younger. [Claimant] is reported to have some difficulty adjusting to changes in his routine. He is reported to cry when faced with new situations. According to [his mother, claimant] . . . does not display any repetitive body movements. He does not always provide appropriate eye contact. [Claimant] needs assistance with some of his self-help needs. .

11. The service agency's consulting psychologist, Roberto De Candia, Ph.D., conducted a psychological evaluation of claimant on January 27, 2011. Dr. De Candia administered several evaluative tools, including the Peabody Picture Vocabulary, Fourth Edition (Peabody 4), the Vineland II, CARS-2, and Leiter-R, to assess claimant in the areas of communication, intellectual functioning, adaptive functioning and affective/behavioral

issues.⁶ On the Peabody 4 claimant achieved standard scores within the average range.⁷ His performance is reported to correspond to an age level of 6 years and one month of age. Dr. De Candia reported that claimant was easy to engage. With respect to the Leiter-R, Dr. De Candia reported a Fluid Reasoning I.Q. score of 90 and a Brief I.Q. score of 97 for claimant. Claimant's overall performance on the Leiter-R places him in the average range of intelligence.⁸ Dr. De Candia reported that claimant's Vineland II results indicate "the presence of significant deficits . . . exists within the domains of Communication, Daily Living Skills and Socialization."⁹ Dr. De Candia reported that on the CARS-2 claimant's results identified "the presence of some autistic-like behaviors, but the survey does not support the presence of the full syndrome of Autism."¹⁰ His report elaborates as follows:

The manner in which [claimant] . . . related with me during our meeting did not demonstrate any major difficulties in interaction. [Claimant] . . . did make fairly good eye contact with me, although I do believe that eye contact tends to be inconsistent at times as described by mother. However[,] she does note that his eye contact has improved. During the session [claimant] . . . was able to cooperate with all of the tasks presented. His attention was easy to obtain and he was easily engaged in the tasks presented. He did seem to be easily distracted at times, and he did seem to be in constant motion. At times I thought he did seem to play with his hair rather frequently, but he did not demonstrate any type of repetitive behaviors. His mother tells me that at home he does have tantrums which occur anywhere from three to four times per week. Tantrums tend to occur when mother interrupts him when he is

⁶ Dr. De Candia did not report employing the Autism Diagnostic Interview-Revised or the Autism Diagnostic Observational Schedule, Module 3, both of which are widely recognized as accurate and authoritative diagnostic assessments of autism.

⁷ Claimant's standard score was reported as 93.

⁸ Dr. De Candia reported Claimant's scaled scores on the Leiter-R as follows:

Fore Ground	7
Form Completion	14
Sequential Order	9
Repeated Patterns	8

⁹ Claimant's scores on the Vineland are reported as follows:

	Standard Scores	Age Level (In years-Months)
Communication	45	1-9
Daily Living Skills	39	2-4
Socialization	50	1-2

¹⁰ Claimant's CARS-2 score is reported as 23.5.

drawing, or if someone changes a channel which he is watching on television. He then becomes upset, he may yell and complain. However, mother reports that his behavior is much better when his siblings are not around and when he is left undisturbed. The mother has not noticed and does not report the presence of any type of repetitive type movements. She notes that he does show interest in toys and is able to play with toys. She reports that his eye contact is at times inconsistent but that it has improved. She notes that he does become upset when it is time to do his homework, he sometimes does not want to go to sleep and he always want to go to sleep with his mother. Mother recalls that when he did change schools he did cry quite a bit for a few days until he became acclimated to the new situation. Mother states that he does seem to be bothered by loud noises from the radio, from the vacuum cleaner and sometimes if others are talking loudly. He is fearful of cockroaches, and on occasions he smells his mom and he sometimes will smell objects. The mother does not describe [claimant] . . . as hyperactive.

Dr. De Candia reported that the overall results of his evaluation “do not support the presence of the full syndrome of Autism. The mother and the school do report the presence of some behavioral characteristics which are associated with the presence of Autistic Disorder, but in my view the aggregate of behaviors do not support the full syndrome of Autism.” Dr. De Candia reported a diagnoses of Pervasive Developmental Disorder NOS (Provisional), Mixed Receptive Expressive Language Disorder (As per IEP 11/05/2010) and Phonological Disorder (As per IEP 11/05/2010).

Claimant’s Mother’s Evaluation

12. Claimant’s mother contends that “the school says [claimant] . . . has autism and I want [the service agency] to help me with my son.”

13. The evidence does not establish that claimant has a diagnosis of Autistic Disorder to qualify him for services and supports pursuant to the Lanterman Act.

LEGAL CONCLUSIONS

1. Under the Lanterman Act, persons with developmental disabilities have a right to treatment and habilitation services and supports. (Welf. & Inst. Code, § 4501.)

2. Section 4512, subdivision (a), defines “developmental disability” to mean the following:

. . . a disability that originates before an individual attains age 18 years, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual. . . . [T]his term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include

disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation, but shall not include other handicapping conditions that are solely physical in nature.

3. California Code of Regulations, title 17, section 54000 further defines “developmental disability” as follows:

(a) “Developmental Disability” means a disability that is attributable to mental retardation, cerebral palsy, epilepsy, autism, or disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation.

(b) The Developmental Disability shall:

(1) Originate before age eighteen;

(2) Be likely to continue indefinitely;

(3) Constitute a substantial disability for the individual . . . ;

(c) Developmental Disability shall not include handicapping conditions that are:

(1) Solely psychiatric disorders where there is impaired intellectual or social functioning which originated as a result of the psychiatric disorder or treatment given for such a disorder. Such psychiatric disorders include psycho-social deprivation and/or psychosis, severe neurosis or personality disorders even where social and intellectual functioning have become seriously impaired as an integral manifestation of the disorder.

(2) Solely learning disabilities. A learning disability is a condition which manifests as a significant discrepancy between estimated cognitive potential and actual level of educational performance and which is not a result of generalized mental retardation, educational or psycho-social deprivation, psychiatric disorder, or sensory loss.

(3) Solely physical in nature. These conditions include congenital anomalies or conditions acquired through disease, accident, or faulty development which are not associated with a neurological impairment that results in need for treatment similar to that required for mental retardation.

4. The Lanterman Act and its implementing regulations contain no definition of “autism.” At hearing the service agency presented its case explicitly relying on the definition of “autism” contained in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR). Thus, “autism” under the Lanterman Act means “Autistic Disorder” as defined by the DSM-IV-TR. Claimant made no objections.

5. As set forth in the DSM-IV-TR, the diagnostic criteria for Autistic Disorder are as follows:

- A. A total of six (or more) items from (1), (2), and (3), with at least two from (1), and one each from (2) and (3):
 - (1) qualitative impairment in social interaction, as manifested by at least two of the following:
 - (a) marked impairment in the use of multiple nonverbal behaviors such as eye-to-eye gaze, facial expression, body posture, and gestures to regulate social interaction
 - (b) failure to develop peer relationships appropriate to developmental level
 - (c) a lack of spontaneous seeking to share enjoyment, interests, or achievement with other people (e.g., by a lack of showing, bringing, or pointing out objects of interest)
 - (d) lack of social or emotional reciprocity
 - (2) qualitative impairments in communication as manifested by at least one of the following:
 - (a) delay in, or total lack of, the development of spoken language (not accompanied by an attempt to compensate through alternative modes of communication such as gesture or mime)
 - (b) in individuals with adequate speech, marked impairment in the ability to initiate or sustain a conversation with others
 - (c) stereotyped and repetitive use of language or idiosyncratic language
 - (d) lack of varied, spontaneous make-believe play or social imitative play appropriate to developmental level

(3) restricted repetitive and stereotyped patterns of behavior, interests, and activities, as manifested by at least one of the following:

- (a) encompassing preoccupation with one or more stereotyped and restricted patterns of interest that is abnormal either in intensity or focus
- (b) apparently inflexible adherence to specific, nonfunctional routines or rituals
- (c) stereotyped and repetitive motor mannerisms (e.g., hand or finger flapping or twisting, or complex whole-body movements)
- (d) persistent preoccupation with parts of objects

B. Delays or abnormal functioning in at least one of the following areas, with onset prior to age 3 years (1) social interaction, (2) language as used in social communication, or (3) symbolic or imaginative play.

C. The disturbance is not better accounted for by Rett's Disorder or Childhood Disintegrative Disorder

6. The Lanterman Act provides that in determining an individual's eligibility for services and supports the service agency is required to consider "evaluations and tests, including but not limited to, intelligence tests, adaptive functioning tests, neurological and neuropsychological tests, diagnostic tests performed by a physician, psychiatric tests, and other tests or evaluations that have been performed by, and are available from, other sources." (Welf. & Inst. Code, § 4643, subd. (b).)

7. A person seeking to establish eligibility for government benefits or services has the burden of proving by a preponderance of the evidence that he or she has met the criteria for eligibility. (*Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161[disability benefits]; *Greatoroex v. Board of Admin.* (1979) 91 Cal. App.3d 54, 57 [retirement benefits]; Evid. Code, § 500.)

8. Claimant has not met his burden of establishing by a preponderance of evidence his eligibility for services and supports under the Lanterman Act. Although reported as inconsistent, claimant makes eye contact during his social interactions. School psychologist Socie reported that claimant has "a history of extreme withdrawal, relating to people inappropriately." It was also reported, however, that once social interaction has been initiated, claimant engages with his peers. He gets along with his siblings. He exhibited no major difficulties interacting with Dr. De Candia during their meeting. The evidence does not establish that claimant manifests a qualitative impairment in social interaction consistent with the criteria set forth in the DSM-IV-TR, paragraph A (1).

9. Claimant speaks both English and Spanish. Claimant has required speech therapy because his speech was difficult to understand. The evidence does not establish any delay in claimant's development of spoken language. The evidence does not establish that claimant engages in stereotypic or idiosyncratic language. The evidence does not establish that claimant manifests a qualitative impairment in communication consistent with the criteria set forth in the DSM-IV-TR, paragraph A (2).

10. Claimant's IEP team has reported that he smells and sniffs objects and that he rocks back and forth while seated. His mother reported to Dr. De Candia that "on occasions" claimant smells her and that he "sometimes" smells objects. Behaviors occurring "on occasion" or "sometimes" do not suggest repetitive patterns of behavior. The evidence does not establish that claimant manifests restricted, repetitive, and stereotyped patterns of behavior, interest, and activities consistent with the criteria set forth in the DSM-IV-TR, paragraph A (3).

11. The DSM-IV-TR indicates that "[b]y definition the onset of Autistic Disorder is prior to age three-years-old." Moreover, "[i]n Autistic Disorder, developmental abnormalities are usually noted within the first year of life." The evidence does not establish the onset of delays or abnormal functioning as set forth in the DSM-IV-TR, paragraph B, prior to claimant attaining age three-years-old.

12. A diagnosis of Autistic Disorder must include at total of six or more items from three categories of impairment, with at least two items from the impairment in social interaction category, and one item from the impairment in communication category and the restricted repetitive/stereotyped behavior patterns category. The evidence does not establish that claimant has a total of six or more of the qualitative impairments required by the DSM-IV-TR.

13. The DSM-IV-TR indicates that "[i]n most cases . . . there is an associated diagnosis of Mental Retardation, which can range from mild to profound." Claimant's evaluations do not report that he manifested signs of the cognitive deficits typical of persons with Autistic Disorder. Dr. De Candia reported that claimant's test scores places him in the average range of intelligence.

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14. Eligibility for special education on the basis of “autistic-like behaviors”¹¹ is not the same as eligibility for regional center services and supports on the basis of “autism.” The Legislature has amended the Lanterman Act, including Welfare and Institutions Code section 4512, numerous times since it was first enacted and has chosen not to change the list of qualifying conditions to include other pervasive developmental disorders, also called “autistic spectrum disorders.” The Legislature is apparently aware of the differentiation between autism and the other autistic spectrum disorders, as demonstrated by its enactment in 2001 of Welfare and Institutions Code section 4643.3, which refers to “autism disorder and other autistic spectrum disorders.”¹² If the Legislature wanted to add other autistic spectrum disorders to the list of qualifying conditions under Welfare and Institutions Code section 4512, subdivision (a), it could have done so. It is a basic rule of statutory construction that, where the Legislature has utilized a term of art or phrase in one place and excluded it in another, it should not be implied where excluded. (*Pasadena Police Officers Association v. City of Pasadena* (1990) 51 Cal.3d 564, 576.) “Autism” as used in Welfare and Institutions Code section 4512, subdivision (a), does not encompass “autism spectrum disorders” or “autistic-like behaviors,” including pervasive developmental disorder.

15. Claimant has not established by a preponderance of evidence that he has a diagnosis of “autism,” as that term is used in the Lanterman Act, to qualify him for regional center services and supports.

¹¹ Claimant’s eligibility for special education services was based on LAUSD’s determination that he exhibits “autistic-like behaviors.” Education Code section 330, subdivision (g), defines “autistic-like behaviors” to include, but not limited to :

- (1) An inability to use oral language for appropriate communication.
- (2) A history of extreme withdrawal or relating to people inappropriately and continued impairment in social interaction from infancy through early childhood.
- (3) An obsession to maintain sameness.
- (4) Extreme preoccupation with objects or inappropriate use of objects or both.
- (5) Extreme resistance to controls.
- (6) Displays peculiar motoric mannerisms and motility patterns.
- (7) Self-stimulating, ritualistic behavior.

¹² Section 4643.3, subdivision (a)(1), provides in pertinent part that “the department shall develop evaluation and diagnostic procedures for the diagnosis of autism disorder and other autistic spectrum disorders.”

16. Cause exists to affirm the service agency's determination that claimant is ineligible for services under the Lanterman Act by reason of Factual Findings 4 through 11, inclusive, and Legal Conclusions 1 through 16, inclusive.

ORDER

Claimant Daniel M.'s appeal is denied without prejudice. In the event claimant obtains a more definitive diagnosis through further comprehensive testing, claimant may reapply for Lanterman Act services and supports.

Dated: August 4, 2011

JENNIFER M. RUSSELL
Administrative Law Judge
Office of Administrative Hearings

NOTICE

THIS IS THE FINAL ADMINISTRATIVE DECISION. THIS DECISION BINDS BOTH PARTIES. EITHER PARTY MAY APPEAL THIS DECISION TO A COURT OF COMPETENT JURISDICTION WITHIN 90 DAYS.